Supreme Court, U. S.
FILED
JUL 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF ASSOCIATED COUNCILS OF THE ARTS, *AMICUS CURIAE*

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BRIEF OF ASSOCIATED COUNCILS OF THE ARTS, *AMICUS CURIAE*

Interest of the *Amicus Curiae*

Associated Councils of the Arts, Inc. (hereinafter "ACA") is a national membership organization of state and community arts agencies devoted to the protection and advancement of the arts and artists. It represents several hundred widely diverse organizations, ranging from The Metropolitan Opera, to the Alaska State Council on the Arts, to the Fine Arts Council of Florida, to the Siouxland Arts Council in Sioux City, Iowa. ACA is concerned with all of the problems that affect artists, art institutions and the general public's enjoyment of artistic and cultural works.

ACA acts as a service agency for its members, providing information and assistance to arts councils and arts organizations throughout the United States. ACA member organizations reflect all artistic disciplines and ACA speaks for the management and financial sides of the art world, as well as the creative and innovative artists themselves. Finally, ACA speaks for the arts consumers—those who enjoy art, buy art, view art, and attend the performing arts—in short all who are concerned and affected by the cultural environment of this country.

ACA has recently formed a new action group known as Advocates for the Arts (hereinafter "Advocates"). The Advocates program aims to identify, through factual and legal research, areas in which legal action might have a material affirmative impact on the rights of arts institutions and individual artists, and areas in which legal action might contribute to the enhancement of the cultural life of the community. Advocates intends to act with respect to these areas through public education, drafting of model legislation and litigation. By participation in litigation, Advocates seeks to accomplish both a viable result in the specific litigation, and the sharpening of public consciousness of the way in which the law affects our cultural life and determines the aesthetic character of our surroundings.

Advocates has identified several areas of immediate concern. One of these areas relates to the economic rights of the creative artists. It is the belief of ACA that the decision below presents a grave threat to such economic rights. If respondent prevails, a legal precedent will be set for reproduction and distribution, by modern technological methods, of literary works of creative artists, without compensation to those artists. ACA is concerned that artists not be deprived of the opportunity to maintain an adequate economic existence, thus permitting them to engage in their artistic activities. ACA believes its position to be consistent with the "Sciences and useful Arts" provision of

the Constitution of the United States and with the Copyright Law of 1909. Accordingly, ACA submits this brief *amicus* to urge reversal of the decision below.

Preliminary Statement

The facts of this case have been summarized fully in petitioner's brief. The legal question addressed to this Court is whether systematic library reproduction and distribution of copyrighted journal articles in their entirety constitutes fair use, or copyright infringement. Since ACA is concerned with the economic well-being of creative artists, this brief will be directed to only the following two issues:

(1) Can a distinction be made, as a matter of law, between library use of scientific journal articles, such as those involved in the case at bar, on the one hand, and literary and other works of creative artists on the other?

(2) Should libraries be permitted to employ modern technological methods to extend and enhance their traditional function of making works available to the public to the detriment of the rights of creative artists under the Copyright Law?

Summary of Argument

1. Library photocopying and distribution of the work of creative artists will adversely affect the ability of artists to receive royalty income on which they depend and to which they are entitled.

2. There is no legal distinction between the photocopying and distribution of scientific journal articles and that of other creative artistic works. A decision in favor of the respondent will necessarily be construed to permit photocopying and distribution of artistic works to the economic detriment of artists.

3. The extension of the "fair use" doctrine to permit wholesale reproduction and distribution by libraries of copyrighted material is contrary to the purpose and language of the Copyright Law and gives special license to "libraries," without legal justification, to infringe on the economic rights of creative artists.

ARGUMENT

A. The Economic Threat to Creative Artists.

The Court below has so applied the copyright "fair use" doctrine as to encourage wholesale library reproduction and distribution of copyrighted works. Those who create artistic works are necessarily threatened. Without copyright protection against unauthorized distribution by libraries of photocopies of their works, creative artists can have no assurance of being paid for their efforts.

If an article from a scientific journal can be reproduced and distributed, why cannot a short story or a poem from a literary magazine also be reproduced and distributed? Why not a musical composition from a workbook of musical scores? Indeed, why not a photograph or a drawing or a lithograph from a photographic magazine or a magazine anthology of art reproductions or lithographs? Why should the library be limited to magazines? Why should it not be permitted to reproduce the same poem, short story, musical composition, photograph, drawing, or lithograph from a paperback book or a hardcover book? Further, it would seem to make no difference, as a matter of law, whether the literary or artistic work is extracted from a collection of works by a single poet, short story writer, composer, photographer, painter, or lithographer, or from an anthology of works by many artists. In either case, an entire creative work would seem to be just as subject as an entire article from a scientific journal to photo-

copying and mailing by libraries to members of the general public. Instead of coming to the library personally to borrow and read the work, the library will give to the "borrower" a permanent personal copy.

However, the composer, poet and the short story writer are directly economically dependent on royalty income, based on the sale of their works to those who desire permanent personal copies. The photographer, the painter, and the lithographer jealously reserve reproduction rights to their works and expect to be paid when they authorize reproduction by or for those who desire permanent personal copies.

If libraries will provide copies of specific works by creative artists upon request, why should anybody buy the entire magazine or paperback or hardcover book containing that specific work? Necessarily, publishers will sell fewer magazines and books, artists will receive less royalty income, and their works will be widely reproduced and distributed without authorization from them or compensation to them.

B. Lack of Legal Distinction for Copyright Purposes Between Scientific and Artistic Works.

It may be contended that the decision below does not necessarily threaten the economic rights of creative artists because it can be limited to the distribution of information significant to scientific research. Indeed, the majority decision below stresses the fact that the copyrighted articles in question were copied and distributed in the interests of advancing medical science, and suggests that the decision is a narrow one.

> "[O]ur holding is restricted to the type and content of use by NIH and NLM, as shown by this record. That is all we have before us, and we do not pass on dissimilar systems or uses of copyrighted materials

by other institutions or enterprises, *or in other fields*, or as applied to items other than journal articles, or with other significant variables." 487 F.2d 1345, 1362.

This suggestion that the unauthorized reproduction and distribution of copyrighted articles on subjects of scholarly scientific interest may be more permissible than similar reproduction and distribution of other copyrighted works is wholly without legal basis. There is no legal warrant for permitting one university professor to receive a copy of a scientific article, while denying another university professor a copy of a poem or short story or drawing.

Article 1, Section 8 of the United States Constitution provides that:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."

The enactment of the Copyright Law (17 USC) was in furtherance of the constitutional purpose of promoting Science and the useful Arts and in compliance with the constitutional mandate of granting to all authors the exclusive rights to their works. The specific purpose and intent of the copyright law is " 'to give to authors the exclusive right to' the productions of their brains when reduced to the form of writings." *Ginn* v. *Apollo Pub. Co.*, 215 Fed. 772, 778 (E.D. Pa. 1914).

Nowhere in the constitutional provision is there any indication of intention to distinguish between scientific writing and other creative works. Indeed, the term "science," as used at the time when the Constitution was drafted, referred to the general knowledge of society, and not merely the physical sciences. Oxford English Dictionary 2668 (Compact Ed. 1971).

The Copyright Law likewise indicates no intention to distinguish between types or fields of writing, or of use of copyrighted material. All of the relevant cases hold directly to the contrary. In *MacMillan Co.* v. *King*, 223 Fed. 864 (D. Mass. 1914), the Court rejected the argument that copyright infringement was justified because of the use of the material. Specifically, the Court found a teacher's one page lesson plans to constitute a copyright infringement because they contained short phrases, usually no more than a sentence, derived or quoted from a copyrighted work. The Court stated:

> "If the above conclusions are right, I am unable to believe that the defendant's use of the outlines is any the less infringement of the copyright because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of his lectures without infringing." 223 Fed. at 867.

Nearly half a century later, in *Wihtol* v. *Crow*, 309 F. 2d 777 (8th Cir. 1962), a school choral instructor (who was also a church choral director) was found to have infringed the plaintiff's copyright by incorporating the plaintiff's song in a new arrangement, duplicating the arrangement 48 times and having it performed *one* time by the 84 voice school chorus and *one* time by the much smaller church choir. In its discussion of fair use, the Court stated:

> "Whatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe . . . It must be kept in mind that the applicable law is purely statutory and that the Copyright Act has little elasticity or flexibility." 309 F. 2d at 780-81.

In both cases, notwithstanding an educational use, directed to the dissemination of knowledge in accordance with the purpose of the constitutional mandate, the copying was held to be an infringement. It is apparent from these and other cases [*Ginn* v. *Apollo Pub. Co., supra; Sampson & Murdoch Co.* v. *Seaver-Redford Co.*, 140 Fed. 539 (1st Cir. 1905)], that neither the kind of material nor the "use" to which the material is put is the touchstone. Where "the copy of all, or substantially all" of a copyrighted work is involved (*Wihtol* v. *Crow, supra*) it has never been suggested, prior to the decision below, that the educational—or "scientific"—use of the material justifies copyright infringement.

Accordingly, notwithstanding the Court's disclaimers, the decision below has the necessary effect of construing the Copyright Law as it applies to *all* works. If the decision is not reversed, it can be predicted with reasonable certainty that libraries will assert the right to reproduce and distribute, through modern technological means, all copyrighted works—including literary and other artistic works.

C. The "Fair Use" Doctrine as Applied to Library Practice.

The "fair use" doctrine is a judicially created exception to the copyright holder's exclusive right to print, reprint, publish, copy and vend the copyrighted work. Enunciated as early as 1841 in *Folsom* v. *Marsh*, 9 Fed. Cas. Case No. 4,901 (C.C.D. Mass.), the doctrine was justified on the basis that the constitutional policy of promoting science and useful arts should not be completely stifled by the exclusive privileges granted by the Copyright Law. Note, 39 Notre Dame Lawyer 161 (1964). However, in developing the fair use doctrine, the courts have been careful to avoid trampling the rights of copyright holders by depriving them of just compensation. " 'Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection.' " *Symposium, Can Copyright Law Respond to the New Technology?*, 61 Law Library J. 387, 403 (1968) (hereinafter cited as "Symposium").

The question of who is the user of the material is irrelevant. Nimmer, Law of Copyright § 145 (1974); Note, 34 U. Cin. L. Rev. 72 (1965). In determining whether a particular infringement was "fair use," the Courts have asked only whether the duplicate copy might diminish the demand for the original and thus deprive the copyright holder of economic benefits to which he otherwise would have been entitled. Nimmer, *supra*. This approach has always heretofore provided the creative artist with a sense of security and economic control over his copyrighted works. The decision below threatens that position.

It is submitted that the Court below did not give adequate consideration to the implications of its decision. Instead, it approached the case at bar as if it involved only a slight expansion of the "fair use" doctrine already applicable to traditional library lending practices. In fact, reproduction and distribution of copyrighted works in their entirety by modern technological methods has nothing to do either with "fair use" or traditional library practices.

Traditionally, the function of libraries has been to provide access to information by lending the original book or magazine to the borrower. For the most part, it was impractical to make a copy of an original work and give it to the user as a permanent personal copy. *Symposium, supra*, at 387. The occasional photostating or handcopying of a copyrighted work by a scholar, or portion of a book or a poem by a creative artist did not cause concern to the scholar or the creative artist, since it had virtually no effect on sales of the original work. Varmer, "Photoduplication of Copyrighted Material by Libraries," Study No. 15, Copyright Law Revision Studies Prepared for Senate Committee on the Judiciary, 86th Cong., 2d Sess. 53 (Comm. Print 1960).

However, there has been a revolution in reproduction techniques; and these new techniques are still in the process of development. Libraries are now able to photocopy inexpensively not only articles from scientific journals, but articles from literary journals, short stories, poems, photographs and reproductions of drawings and lithographs. As cheap color reproduction techniques become perfected, libraries will be able to provide prints of art works from art books by living artists. The fact that it is a library which reproduces and distributes such work will give no comfort or economic support to the creative artist.

The photocopying activities of the respondent are but the first step in the reprography revolution. Should these activities be permitted to continue without regard to the rights of copyright owners, it would not be difficult to foresee a time when but one copy of a poem or short story or even a novel need be published and be readily made available to all free of charge. *See Symposium, supra.*

The decision below arouses these concerns because it expands the fair use concept into areas of infringement that Congress clearly intended to prohibit by the Copyright Law. Although, as a general rule, a statute may be construed to take account of changes in technology, the copyright statute "ought not to be unduly extended by judicial construction to include privileges not intended to be conferred . . . ." *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 346 (1908). *See, also, Jerome H. Remick & Co.* v. *American Auto. Accessories Co.,* 5 F. 2d 411 (6th Cir. 1925), *cert. den.* 269 U.S. 556. At the time of the 1909 Copyright Law, Congress was fully aware of the fair use doctrine and its implications. It had been enunciated at least sixty-eight years earlier. The revolutionary change that has occurred in the field of reprography could in no way have been contemplated by Congress to be within the realm of fair use. If wholesale photocopying of works in their entirety is to be permitted, it should be

by Congressional action, not by judicial expansion of the fair use doctrine to a point where the economic rights of creative artists are threatened.

CONCLUSION

We respectfully submit that the decision below unreasonably extends the "fair use" doctrine and gives a license for copyright infringement in the guise of library lending. Reproduction and distribution on a substantial scale of entire articles from copyrighted magazines constitute copyright infringement, no matter who engages in the practice, and no matter the educational or scientific purpose purportedly being served.

As a legal matter, there is no more justification for reproduction and distribution of an entire article from a copyrighted scientific magazine to a university researcher, than there is for reproduction and distribution of a poem or short story from a copyrighted literary magazine to a university English professor for use in his English class. Accordingly, the decision below represents a real threat to the creative artist who depends for his economic livelihood on reservation of reproduction rights and royalty income.

ACA therefore respectfully urges that the decision below be reversed, and the purpose of the Copyright Law—the protection of the creative artist—be reaffirmed.

Respectfully submitted,

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July 26, 1974